the instant case far transcends the rights or interests of these particular litigants.

Since this is a claim for personal injuries, as distinguished from one for cargo or hull damage, the question of applicability of the rule is one not heretofore passed upon by this Honorable Court.

The Court of Appeals for the Fifth Circuit, in its instant opinion, evaded the question, so far as we are able to ascertain, and we respectfully submit that the problem merits the favorable consideration of this Court.

(2)

The Standard Applied by the Court of Appeals in Sustaining the Jury's Verdict was Erroneous

The Court of Appeals in the instant case apparently felt that the rule of *The Pennsylvania* was applicable to the case. Yet, in appraising the evidence, the Court of Appeals did not apply *The Pennsylvania* rule. Moreover, in evaluating the evidence from the standpoint of its permissive inferences, the Court of Appeals imputed to the jury findings which, in essence, permit respondent to have successfully pleaded its own turpitued as a defense.

We are fully cognizant of the well established principle that a jury's verdict must be sustained if there is more than a scintilla of evidence upon which to base a reasonable

supporting inference.[29] The supporting inference must, however, be a *reasonable* one.[30]

The Court of Appeals drew from the evidence inferences which, if actually drawn by the jury in this case, imply that the jury fell far short of a fair performance of its constitutional function.[31]

This Honorable Court has recently reaffirmed the proposition that juries are not to be presumed to have failed in the performance of their duty to decide cases fairly and impartially.[32] If that presumption be indulged in here, we submit that it cannot possibly be said that the jury inferred as the Court of Appeals thought it might have done, under the circumstances of this case.

The only reasonable conclusion which can be drawn is that the jury arrived at its verdict for respondent in this case because it was not properly instructed as to the law. In this instance, the Trial Court did not charge the jury on the rule of *The Pennsylvania*. Therefore, to prevent a miscarriage of justice, a new trial should be ordered.[33] There was no evidence upon which a fair and reasonable inference could have been drawn by the jury to rebut the presumption of causation which flowed from respondent's failure to keep a proper lookout aboard its tug.

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[29] Ferguson v. Moore-McCormack Lines, Inc., 77 S. Ct. 457 (1957).

[30] Senko v. LaCrosse Dredging Corp., 77 S. Ct. 415, 417 (1957): "The essence of this discretion is that a jury's decision is final *if* it has a *reasonable* basis, . . . " (Emphasis added)

[31] See Wilkerson v. McCarty, 336 U. S. 53, 69 S. Ct. 413 (1949).

[32] Ibid.

[33] Whiteman v. Pitrie, 220 F. 2d 914 (CCA 5th, 1955); Marsh v. Ill. Central R. Co., 175 F. 2d 498 (CCA 5th, 1949).

ARGUMENT

(1)

The Rule of The Pennsylvania Should Apply

The question of the applicability of the rule of *The Pennsylvania* in Jones Act claims has been presented to the Courts of Appeals in two recent cases.[34]

In one case[35] the violation or statutory fault involved the number of the crew. In the other case[36] the violation was the failure to carry a licensed tankerman by a vessel engaged in transporting oil. Neither case applied the presumption of fault which flows from the rule; but, neither case was one of *collision*, involving a *navigational* rule breach.

The instant case, insofar as its classification by the type of disaster, is a case of "collision".

It seems well established that "collision", as used in admiralty parlance, involves the striking of a fixed object by a vessel, as well as the striking of two vessels.[37] There is no doubt that the SUWANNEE'S tow and, in fact the vessel herself, collided with the bank of the waterway in which she was running.[38]

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[34] Mason v. Lynch Bros. Co., 228 F. 2d 709 (CCA 4th, 1956); Pierro v. Carnegie-Illinois Steel Corp., 186 F. 2d 75 (CCA 3d, 1950).
[35] Pierro v. Carnegie-Illinois Steel Corp., supra.
[36] Mason v. Lynch Bros. Company, supra, note 34.
[37] Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004 (1896); Atlee v. Northwestern Union Packet Co., 21 Wall. 389, 22 L. Ed. 619 (1874).
[38] R. 150.

In one of the cases previously referred to, the Court of Appeals for the Fourth Circuit found that it was unnecessary to consider whether the rule of *The Pennsylvania* ought to be applied in the case.[39] Therefore, it cannot be said that this case *holds* that the rule is inapplicable.

In the other case, however, the Court of Appeals for the Third Circuit squarely held the rule to be inapplicable.[40] That case, while refusing to apply the rule to its facts, seems to furnish a sound reason for applying the rule to the facts of the instant case. The Court of Appeals for the Third Circuit held that the presumption of fault embodied in the rule is a function in admiralty, used in the technique for determining fault of vessels involved in disasters.[41] The court further describes the rule as a "product of philosophy peculiar to United States admiralty law, that disasters are likely to occur when statutes passed for the express purpose of promoting safety in navigation are violated."[42]

Thus, this Honorable Court held, in the case of *The Pennsylvania*:

> "Such a rule is necessary to enforce obedience to the mandate of the statute."[43]

There seems to be no sound reason for distinguishing between property damage claims and personal injury claims

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[39] Mason v. Lynch Bros. Company, supra, note 34.
[40] Pierro v. Carnegie-Illinois Steel Corp., supra, note 34.
[41] Pierro v. Carnegie-Illinois Steel Corp., 186 F. 2d 75, 78.
[42] Ibid.
[43] The Pennsylvania, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, 151.

arising out of violations of navigational statutory enactments.

Actually, the esteem with which we regard human life and limb requires a more ready application of the rule in the instant situation than in those cases wherein only a ship, or cargo, or a wharf are damaged.

There is, in protecting human life and limb, at least the same necessity for enforcement of obedience to the statutory rules as is found in protecting property.

(2)

The Court of Appeals' Appraisal of the Evidence and Its Permissive Inferences Was Erroneous, Was Based Upon an Incorrect Standard and Results in a Miscarriage of Justice

In the opinion of which review is now sought, the Court of Appeals did *not* say that there was any evidence from which the jury could have reasonably inferred that a proper lookout *was* maintained aboard the SUWANNEE prior to and at the time of the disaster. At best, the Court of Appeals found that whether or not a proper lookout was maintained is, ordinarily, a question of fact.

Under the instant evidence, *the lookout was in the galley* of the vessel.[44] This is the only evidence regarding a look-

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[44]R 152-153.

out and it admits of only one reasonable inference: there was no lookout at all.[45]

The rule prescribed for navigation in the waters in which the SUWANNEE was then travelling required that the vessel maintain a "proper lookout".[46] Having failed to maintain *any* lookout, the SUWANNEE was guilty of a "statutory fault."[47]

Under the rule of *The Pennsylvania,* the fact of the "statutory fault" created a presumption, and a strong presumption, that the disaster was caused or contributed to by the failure to have a lookout.

The question with which the Court of Appeals was then confronted was whether there was evidence from which a reasonable inference could have been drawn by the jury that the failure to have a lookout, not "would have made no difference", but, *could* have made no difference in the ultimate result, i. e., the collision and sinking.

In upholding the jury's verdict, the Court of Appeals regarded as determinative the evidence that the SUWANNEE was unmaneuverable because of her heavy load and speed. From this evidence, the Court of Appeals held that the jury was warranted in inferring that a lookout *would* not have made any difference in the outcome. Even if the standard of "would" or "did" were the proper one, we respectfully submit that the evidence relied on to support the jury's verdict for respondent is, in reality, condemning

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[45]See G. B. Zigler Co. v. Barker Barge Line, 167 F. 2d 676, 678 (CCA 5th, 1948).
[46]33 U. S. C. A. 221.
[47]G. B. Zigler Co. v. Barker Barge Line, supra, note 45.

evidence of respondent's negligence on grounds other than failure to have a proper lookout.

To put the same proposition differently, if the jury had actually inferred from the evidence that the SUWANNEE was overladen and travelling too fast under the circumstances, it is not reasonable to assume that the question of lookout would have even been decided; the verdict would have been for petitioner on the basis of unmanageverability or excessive speed, or both.[47A]

We respectfully submit that, if we are to assume that the jury will fairly perform its constitutional function,[48] this jury must be presumed to have returned its verdict for respondent because it was not properly instructed as to the law, regarding the presumption of causation which flows from the failure to have a lookout.

The trial Judge charged the jury that petitioner had the burden of proving that the sinking occurred through the negligence of respondent. However, the Judge did *not* tell the jury that this burden was legally met by the mere proof of a violation of the statute on lookout, unless respondent could prove that this violation *could* not have caused or contributed to the sinking. This latter burden respondent did not carry; therefore, had the jury been properly instructed, it must be presumed that the verdict would have been in petitioner's favor. Consequently, a new trial should be granted.[49]

[47A] R 143, 149.
[48] Wilkerson v. McCarty, supra, note 31.
[49] Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

WHEREFORE, this cause merits the consideration of this Honorable Court and a remand for new trial under proper legal instructions, toward which end the foregoing petition is

Respectfully submitted,

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APPENDIX "A"

(Number and Title Omitted)

(March 27, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Appellant Wilson brought this suit under the Jones Act for personal injury and property damage allegedly sustained when the tug SUWANNEE, on which he was employed by the appellee as a cook, sank in the Intracoastal Waterway near Mile 244, West of Harvey, Louisiana, at approximately 3:00 A. M. the night of February 4, 1950. Appellant's motions for directed verdicts were overruled. The jury returned its verdict for the defendant, appellee, after which appellant's motions for judgment NOV and in the alternative, for a new trial were overruled. The primary question to be considered here is whether, under the circumstances, the failure of the SUWANNEE to have a lookout upon the lead barge which it was pushing is presumed as a matter of law to have contributed to the sinking, placing upon the SUWANNEE the burden of establishing that its failure to have a lookout did not, or could not, have contributed to the sinking.

Shortly before 3:00 A. M., the SUWANNEE, a 650 H.P. diesel tug, engine room controlled and 76 feet in length, was proceeding eastward at six knots, with a three and one-half mile current pushing her, towards New Orleans in the Intracoastal Waterway, pushing a tow of two loaded oil barges each 250 feet in length and 50 feet in breadth.

The tow was lashed to the tug with one inch cable. As the SUWANNEE approached a fifty degree bend in the waterway near Mile 244, West of Harvey, Louisiana, Pilot Adams sounded the proper signal, one prolonged blast. There was no answer, but Adams, the only man in the pilot house on watch, saw the searchlight of another vessel around the bend. Shortly thereafter the tug E. D. SMITH, without a tow, rounded the bend proceeding westward. These vessels, each on its proper, the starboard, side of the channel met and passed safely, port to port.

When the lead barge of the SUWANNEE'S tow was one hundred feet from the bend and the SMITH abreast of the SUWANNEE, Adams sighted an unidentified tow of more than one barge following the SMITH by about two hundred yards and hogging the center of the channel. Immediately realizing the danger of collision, Adams sounded the danger signal, reversed his engine full astern and put the wheel hard right in order to bring the tow closer to the bank. The headway of the SUWANNEE was not checked by reversing the engine full astern since her stopping distance under the circumstances was a quarter of a mile.

The lead barge of the SUWANNEE struck and slid along the bank of the channel as the unidentified tug and tow passed a few feet away. As a result of the SUWANNEE'S tow striking the bank one cable parted, leaving the other intact, the ultimate effect of which was to pull the stern of the SUWANNEE into the bank, causing to list, take on water and, finally, to sink.

During all of this time the appellant was asleep in his bunk below deck. It was during his escape from the sinking

tug that he allegedly sustained the injury for which this suit was brought.

In addition to Pilot Adams and the engineer on watch, a deckhand, who was a lookout in conjunction with other duties to be performed as requested, was on watch at the time of the accident and was in the galley where, according to Adams, he was supposed to be.

Citing 33 U.S.C.A. §221,[1] and relying upon *Zigler Co. v. Barker*, 5th Cir. 1948, 167 F. 2d 676, and *Smith v. Bacon*, 5 Cir., 1952, 194 F. 2d 303, appellant contends that the appellee failed to maintain the proper lookout required by law, casting upon the appellee the burden of showing that its failure not only did not, but could not, have caused or contributed to the sinking under the "Pennsylvania Rule", The PENNSYLVANIA, 86 U. S. 125 (1873); and that appellee offered no evidence to rebut the legal presumption of causal connection between the sinking and the lack of a lookout, thus entitling appellant to a directed verdict.

We cannot agree. Under the circumstances, whether appellee maintained a proper lookout was a question of fact. In *Parker Bros. & Co. v. De Forest*, 221 F. 2d 377, (1955), we said: "This Court did not intend, by its reaffirmation in Smith v. Bacon, supra, of the rule previously set forth in

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[1] "USUAL ADDITIONAL PRECAUTIONS REQUIRED GENERALLY. Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

the Zigler case, supra, to lay down 'an arbitrary rule requiring tug operators to maintain a lookout on the lead barge of every tow regardless of the circumstances,' . . . The wording of the rule itself, as well as the controlling facts upon which the Smith and Zigler decisions are based, clearly reveal that a separate and independent lookout aboard a tug or the lead barge of its forward tow are not inexorable requirements of prudent tug navigation, but show that the question of competency of a lookout in any instance is primarily one of fact, to be realistically resolved under all of the circumstances . . . ".[2]

Considering the cumbersome maneuverability of the SUWANNEE with two loaded oil barges, together with the fact that it took a quarter of a mile to stop with her engine full astern, the small additional time within which to act, which might have been gained if a lookout had been on the lead barge in a position to sooner sight the unidentified tow and pass the word to Pilot Adams, was no more than a circumstance to be considered by the jury, and under these conditions as a whole the jury was warranted in finding that the outcome would have been no different if the lookout had been posted.

Appellant's alternate contention that he was entitled to a new trial for the refusal of the Court to grant a requested instruction and because the Court, in giving supplemental instructions requested by the jury, injected the circumstance

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[2]See also Koch-Ellis v. Chemical Barge Lines, 244 F. 2d 115, 5 Cir. 1955; Compania de Maderas, Etc. v. The Queenston Heights, 220 F. 2d 120, 5 Cir. 1955, and Petrich v. Hansen, 204 F. 2d 261, 9 Cir. 1953.

of fog when there was no evidence regarding fog in the record is without merit. The requested instruction was adequately covered by the Court's general charge and the comment regarding the fog was merely by way of illustration and clarification, not framed in such a way as to mislead the jury.

The judgment is, accordingly, AFFIRMED.

CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served a copy of the attached Petition upon the attorney for Respondent by depositing the same in the U. S. mails, postage pre-paid, at New Orleans, Louisiana, addressed to Paul A. Gaudet, Esq., c/o Deutsch, Kerrigan and Stiles, Attorneys at Law, Hibernia Bank Building, New Orleans 12, Louisiana.

July _____, 1957.

Samuel C. Gainsburgh

JUL 30 195
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 327

JOSEPH G. WILSON,
Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. _____

JOSEPH G. WILSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,

Respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Joseph G. Wilson, a merchant seaman, respectfully prays that a Writ of Certiorari issue herein to the United States Court of Appeals for the Fifth Circuit to review its judgment entered herein on March 27, 1957, regarding which said judgment a petition for rehearing was denied by the Court of Appeals on May 3, 1957.

OPINIONS IN THE LOWER COURTS

This cause was tried to a jury which returned a verdict in favor of respondent. The District Court for the Eastern

District of Louisiana, New Orleans Division, rendered no opinion in the case, but entered judgment on the verdict.

Petitioner appealed to the Court of Appeals for the Fifth Circuit and that Court's opinion is reported officially at 242 F. 2d 727 (1957). The opinion of the Court of Appeals is also printed in Appendix "A" of this application.

JURISDICTION

This was an action under the Jones Act[1] and the General Maritime Law.

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered on March 27, 1957;[2] the order of the Court of Appeals denying petitioner's timely application for rehearing was rendered and entered on May 3, 1957.[3]

Jurisdiction of this Honorable Court is envoked under Title 28, U. S. Code, Section 1254(1).

THE QUESTIONS PRESENTED

(1) Does the fact that this is a claim for personal injuries exclude from application to the case the rationale of this Honorable Court's opinion in the case of *The Pennsylvania*,[4] which held that where a vessel involved in collision is guilty of a statutory navigational fault, the burden is upon that

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[1] 46 U. S. C. A. 688, et seq.
[2] R 343.
[3] R 348.
[4] 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148 (1873).

vessel to show that the fault of which she was guilty, not only did not, but, could not have caused or contributed to the disaster?

(2) Should a Court of Appeals, in reviewing the evidence upon which a jury's verdict is based, impute to the jury an inference or conclusion which implies that the jury fell far short of a fair performance of its constitutional function?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision applicable to the instant matter is Article 3, Section 2, Clause 1:

> "The judicial Power shall extend to all Cases . . . of admiralty and maritime jurisdiction; . . . "

The statutes involved are the *Jones Act*,[5] reading in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . "

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[5]Supra, note 1.

The *Federal Employers Liability Act*,[6] reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment . . ."

> "That in any action brought * * * by virtue of any of the provisions of this chapter, to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; and no employee shell be held to have assumed the risk of his employment in any case where the violation * * * of any statute enacted for the safety of employees contributed to the injury or death of such employee."

And The *Inland Rules*[7] reading in part as follows:

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[6] 45 U. S. C. A. 51, et seq.
[7] 33 U. S. C. A. 151, et seq.

"33 U.S.C.A., Sec. 221. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences . . . of any neglect to keep a proper lookout . . . "

STATEMENT OF THE CASE

Petitioner, a seaman, brought this action against respondent, his former employer, for damages which petitioner allegedly sustained while serving aboard respondent's vessel, SUWANNEE.

After a trial by jury, there was a verdict in favor of respondent[8] upon which the District Court entered judgment dismissing the case.[9]

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the dismissal of petitioner's suit.[10]

By this application, petitioner seeks a writ of certiorari to the Court of Appeals for the Fifth Circuit, to the end that this Honorable Court will review this cause and remand the same to the District Court for a new trial.

THE FACTS

In the early morning hours of February 4, 1950, the SUWANNEE, a 650 H.P. diesel, engine-room-controlled tug,

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[8]R 11.
[9]R 326.
[10]R 343.

seventy-six feet in length, was making her way along the Intracoastal Waterway, travelling east, toward New Orleans, approaching Mile 244, West of Harvey, Louisiana.[11]

The vessel was pushing two loaded oil barges of 250 feet in length, each, secured in tandem to the vessel's bow with one inch cable.[12] The SUWANNEE was proceeding at about six knots, with a three and one-half mile fair current.[13]

Just prior to reaching Mile 244, the vessel and tow approached a bend with which her pilot was familiar.[14] The pilot sounded a bend signal (one prolonged blast of his whistle) but there was no answer.[15] Shortly thereafter, a tug, without tow, rounded the bend ahead of the SUWANNEE and the two vessels passed without mishap, port to port, before the SUWANNEE'S lead barge had reached the bend.[16]

While the SUWANNEE herself was still about 600 feet from the bend, the pilot noticed another tug and tow of more than one barge, not yet abreast of the SUWANNEE'S lead barge, travelling toward the SUWANNEE toward the center of the waterway.[17] This second vessel and tow had been hidden from the pilot's view by the first tug.[18]

The pilot immediately sounded the danger signal, ordered

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[11]R 122, 126.
[12]R 120, 121, 138, 146.
[13]R 143, 151.
[14]R 123.
[15]R 126-127.
[16]R 130.
[17]R 130-132.
[18]R 131.

the engines brought to full reverse and gave the SUWANNEE a hard right rudder.[19] Putting the vessel hard to starboard caused her lead barge to strike the side of the waterway and slide along the bank of the channel.[20] This resulted in the parting of one of the towing cables, the ultimate effect of which was to heel the SUWANNEE over on her port side through which she took water and sank.[21]

During all of the foregoing, petitioner was asleep in his bunk below deck.[22] He was allegedly injured making his escape from the sinking vessel.[23]

At and prior to the time the SUWANNEE approached the bend, the pilot was alone in the wheelhouse.[24] There was an engineer on duty in the engine room[25] and there was a deckhand awake at the time to serve as lookout;[26] he was in the galley of the vessel at the time of the disaster.[27]

REASONS RELIED ON FOR GRANTING THE WRIT

(1)

Applicability of the Pennsylvania Rule[28]

Whether or not the rule of *The Pennsylvania* applies in

19R 148-150.
20R 150.
21R 150.
22R 64-65.
23R 71, 74, 75, 80, 81-84, 86.
24R 152.
25R 152.
26R 152-153.
27R 152-153.
28Supra, note 4.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 327

JOSEPH G. WILSON,

Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 327

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PETITIONER'S REPLY BRIEF

MAY IT PLEASE THE COURT:

Respondent asserts that: "The question of adequacy of lookout is one of fact."

Under the instant circumstances, respondent implies that the jury could have found that a tug, heavily laden, traveling at night in a narrow, well-traveled, winding waterway, with only a helmsman on deck, was maintaining the "proper lookout" contemplated by Congress in the Inland Rules.

To put respondent's contention still another way, it is: The helmsman is a proper lookout.

This is diametrically contrary to legal definition:

> "Proper lookouts are competent persons, *other than the master and helmsman*, properly stationed for that purpose on the forward part of the vessel; . . ."[1] (Emphasis added).

Since the so-called "lookout" in the instant case was not on the forward part of the vessel, nor even on deck, nor even in the pilothouse, we submit that there is not a scintilla of evidence upon which the jury could have found as a fact that a "proper lookout" was maintained.

Therefore, as a matter of fact and law, respondent was guilty of a statutory navigational fault.

In its brief, respondent quotes a *part* of the charge given by the trial court.

We submit that it is from the entire charge, taken as a *whole* rather than piecemeal, that the correctness of the trial court's instructions is to be determined.

The sentence of the charge, from which respondent has quoted only in part, was given by the court as follows:

> "If you find, under the evidence in this case, that in the management and operation of the Tug SUWANNEE, the defendant, Oil Transport Company, Inc., through those in charge of the navigation of the Tug SUWANNEE, was guilty of any breach of the rules regarding signals or proper lookout as heretofore stated to you, *and that such*

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[1]Ziegler v. Bacon, 167 F. 2d 676, 678 (C.C.A. 5th, 1948).

breach proximately caused or contributed to the sinking of the Tug SUWANNEE, you may return your verdict in favor of the plaintiff."[2] (Emphasis added).

This charge, alone, is not compatible with the rule of *The Pennsylvania*, because, under *The Pennsylvania* rule, proximate cause is *presumed* from the breach of a statutory regulation. Therefore, the charge was not proper without additional clarification on the part of the trial court; the jury should have been instructed as to the obligation of *respondent* to *rebut* the legal *presumption* of causal connection and liability resulting from failure to have the proper lookout. In other words, while the jury had to find causal connection to return a verdict for plaintiff, *this finding was permissible by presumption* and did not depend only upon evidentiary proof. The existence of the presumption was not made known to the jury by the court.

Moreover, a reading of the whole charge given by the trial court will also disclose that the jury was in other ways not instructed in accordance with the rule of *The Pennsylvania*.

On three occasions[3] the court informed the jury that the plaintiff had the burden of proof, and, in one instance, that the burden of proof never shifted.[4] Furthermore, an express instruction was given to the effect that, in order to recover, the plaintiff was required to have affirmatively

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[2]R. 301
[3]R. 295, 296, 303
[4]R. 293

shown that the accident was proximately caused by the negligence of respondent.

The Court charged the jury that the burden of proof lay with the plaintiff and remained with the plaintiff.[5] The court repeated on several occasions that proximate cause was a necessary finding and must have been proved by the plaintiff.

These charges were the antitheses of the rule of *The Pennsylvania* which creates a legal *presumption* that the defendant's failure to comply with statutory regulations is causally related to the casualty. *Presumption is inherent* in the rule of *The Pennsylvania;* under the rule, *causation is presumed;* it need not be proved.

Taking the trial court's charge as a whole, we submit that this jury required petitioner to prove that the absence of a lookout caused or contributed to the sinking of the SUWANNEE; the essence of the court's charge gave petitioner that burden. Under the rule of *The Pennsylvania*, however, this was not petitioner's obligation.

Since the law given to the jury was materially different from the law which the jury ought to have been given, the case should be reviewed by this Honorable Court and re-

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[5] R. 296.

manded for a new trial, toward which end all of the foregoing is

Respectfully submitted.

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CERTIFICATE

I, the undersigned, being a member of the bar of the Supreme Court of the United States, hereby certify that I have this day served copies of the above and foregoing Reply Brief upon counsel for respondent by depositing the same in the United States Mails, postage pre-paid at New Orleans, Louisiana, addressed to Eberhard Deutsch, Esquire, Hibernia Bank Building, New Orleans 12, Louisiana.

September ____, 1957.

_____
SAMUEL C. GAINSBURGH

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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 327

JOSEPH G. WILSON

Petitioner

versus

OIL TRANSPORT COMPANY, INC.

Respondent

On certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The only appellate question raised in the instant case was whether the record contains evidence from which the jury could properly infer (as it did) that an adequate lookout was in fact maintained. This question was resolved in the affirmative.

There is accordingly no occasion to consider any question as to the correct rule to be applied in the absence of a proper lookout.

The case therefore presents no question appropriate for review by this court.

STATEMENT OF THE CASE

To avoid collision with an on-coming tow "hogging the center of the channel"[1] in the Intracoastal Waterway, the pilot of respondent's Tug *Suwannee* maneuvered his tug and tow into the bank, where the *Suwannee* sank.

Petitioner, a member of the *Suwannee's* crew, asserted that he was injured in escaping to the safety of one of the barges; and that the accident was caused by inadequacy of the *Suwannee's* lookout. The jury found for respondent, and the Court of Appeals affirmed.

[1] 242 F2d 727, 729; petitioner's brief, p. 17.

ARGUMENT

The burden of the petition for certiorari is that the courts below erroneously refused to apply to the case the Rule of *The Pennsylvania* that a statutory fault places on the offending party the burden of proving that the violation could not have contributed to the accident.

But before this rule can apply, a statutory violation must be shown. The only statutory fault claimed by petitioner is inadequacy of lookout.

The question of adequacy of lookout is one of fact.[2]

Petitioner requested charges that "it was the duty of the defendant . . . to maintain aboard the Tug *Suwannee*, and her tow a proper lookout" and that if the defendant "was guilty of any breach of the rules regarding . . . proper lookout" a verdict should be returned in favor of plaintiff."[3]

These charges were given by the district judge verbatim as requested by petitioner;[4] and, as stated, the jury found for respondent.

The case accordingly presents no question as to any rule to be applied in the absence of a proper lookout.

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[2] 33 USC 221 does not specify any requirements for the lookout other than that it be "adequate". "The wording of the rule itself . . . clearly reveal(s) that a separate and independent lookout aboard a tug or the lead barge of its forward tow are not inexorable requirements of prudent tug navigation. . . . The question of competency of a lookout in any instance is primarily one of fact, to be realistically resolved under all of the circumstances". Parker Bros. & Co. vs DeForrest, 221 F2d 377, 380 (CA 5-1955). See also The Blue Jacket, 144 US 371, 389 (1892); Koch-Ellis vs Chemical Barge Lines, 224 F2d 115 (CA 5-1955); Compania De Maderas, etc. vs The Queenston Heights, 220 F2d 120 (CA 5-1955); Petrich vs Hansen, 201 F2d 261, 263 (CA 5-1953).

[3] R. 322.

[4] R. 300.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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August, 1957